

SUPPLEMENTAL McNAMARA DECLARATION
EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS LLC,
JOHN WILEY & SONS, INC., and
PENGUIN RANDOM HOUSE LLC,

Plaintiffs,

vs.

No. 1:20-cv-04160-JGK

INTERNET ARCHIVE and DOES 1
through 5, inclusive,
Defendants.

_____ /

-- ATTORNEYS' EYES ONLY --

VIDEOTAPED RULE 30(B)(1) AND 30(B)(6) DEPOSITIONS OF
JOHN WILEY & SONS, INC., BY ALAN PAVESE
Remote Zoom Proceedings
East Durham, New York
Friday, December 10, 2021

REPORTED BY:

LESLIE ROCKWOOD ROSAS, RPR, CSR 3462

Pages 1 - 278

Job No. 4867787

Page 1

1 changes in revenue you may have observed with titles?

2 MS. STEINMAN: Objection.

3 THE WITNESS: I'm sure -- well, I don't think

4 we've printed the cover upside down. I don't think any

5 of those authors have been accused of plagiarism. Trying 12:06:11

6 to go backwards. You know, there's definitely been COVID

7 impacts. There's definitely been piracy impacts. What

8 else was on the list of -- did I -- does that cover any

9 of them? Anything that I cited that I didn't just

10 answer? 12:06:37

11 Q. BY MS. LANIER: So let's -- let's go back a

12 little bit, and I'll try to walk this through a little

13 more step by step, so it's -- doesn't put the onus

14 entirely on you.

15 A. Yeah. 12:06:49

16 Q. That's probably fair; right?

17 So has Wiley observed any unexpected changes in

18 revenue, either higher than expected or lower than

19 expected, for titles that are involved in this lawsuit?

20 MS. STEINMAN: Objection. 12:07:06

21 Go ahead, Alan.

22 THE WITNESS: So we have experienced loss of

23 revenue due to piracy. Titles in this lawsuit have been

24 pirated, so, yes, there is definitely impact, you know,

25 on the titles-in-suit. 12:07:24

1 Q. BY MS. LANIER: Okay. So when you say "due to
2 piracy," what data do you have that shows that depressed
3 revenue is related to piracy?

4 MS. STEINMAN: Objection.

5 THE WITNESS: Go back to the answer millennia of 12:07:40
6 just everyday experience that when commercial products
7 are stolen, they cannot be -- the commercial market does
8 not function.

9 Q. BY MS. LANIER: Okay. Anything else?

10 A. So as a general concept, so we also have lots of 12:07:57
11 industry data showing that there is hundreds of millions
12 of dollars of impact to the publishing industry from
13 pirated content and illicit markets that have, you know,
14 damaged publishers, authors, legitimately functioning
15 aggregators. 12:08:20

16 Q. Okay. When you say "industry data," are you
17 referring to any specific studies or analyses?

18 A. Some, yeah. I think there's some common I'll
19 call them third-party entities like Nielsen, who have
20 done estimates in, you know, recent years on the impact 12:08:42
21 of piracy, a number of them. Folks like Perlego, who has
22 been in the industry and also sort of looked at roughly a
23 \$300 million impact several years ago. You know, I would
24 consider those industry estimates of piracy.

25 Q. Okay. So Nielsen, Perlego. Anything else? 12:09:03

1 A. Those are two common ones that, you know -- but
2 no.

3 Q. Okay. And when revenue either exceeds or is
4 below expectations, how closes is Wiley able to get in
5 pinpointing the source of that change? 12:09:31

6 MS. STEINMAN: Objection.

7 THE WITNESS: With precision?

8 Q. BY MS. LANIER: Yes.

9 A. It's a bit difficult, so it's a complex
10 estimation. As you might imagine, people who steal 12:09:46
11 things don't always report how much they've stolen and
12 how often they've stolen it, so it's always difficult to
13 try and get data on, you know, illegally functioning
14 markets and distribution networks, so we do perform and
15 rely on estimates like the one Nielsen did to try and 12:10:10
16 find out information that people don't want found out.

17 Q. Okay. And a couple of answers ago you used the
18 phrase, or term I should say, "legitimately functioning
19 aggregators." Can you tell me a little bit what you mean
20 by that? 12:10:33

21 A. Yeah. So aggregators that are licensed and
22 authorized to distribute our content within the terms and
23 conditions and pricing that we have agreed to have them
24 distributed, as opposed to pirate sites, and I would
25 argue the Internet Archive, who is operating unauthorized 12:10:52

1 illegal aggregation of our content outside of the
2 author's and the publisher's functioning commercial
3 markets and intended distribution.

4 Q. Okay.

5 A. I would consider that illegitimate. 12:11:08

6 Q. Okay. Could you explain a bit -- and forgive me
7 if I'm again needing a vocabulary lesson. Your phrase
8 "the Internet Archive, who is operating unauthorized
9 illegal aggregation," can you explain a little bit what
10 you mean by that? 12:11:38

11 MS. STEINMAN: I think he said an unauthorized.

12 MS. LANIER: I thought I said unauthorized, but
13 if I didn't --

14 THE WITNESS: Unauthorized is -- yeah. Yeah,
15 unauthorized. 12:11:47

16 So basically, there is no legal duplication of
17 our digital content permissible, and the Internet Archive
18 is creating illegal digital copies that are not authored
19 for use, not authorized to be allowed for use by the
20 people they're copying from -- them from. So there is, 12:12:12
21 you know, a complete copyright infringement that is in
22 use by Internet Archive to aggregate -- air quotes,
23 sorry -- our content illegally, unauthorized and
24 illicitly.

25 Q. BY MS. LANIER: And you testified a moment ago 12:12:49

1 You know, when we get repeated chattering about
2 a certain thing that, you know, organizationally it
3 crosses a perceptible threshold of: Hey, we all agree
4 this is definitely going to kill us. You know, those
5 are -- you know, those are the ones that we are, you 16:26:24
6 know, actively engaging, documenting and aligning with
7 the legal team to strategize on how to address to protect
8 us and the authors.

9 Q. In Wiley's view, was that threshold crossed with
10 the Internet Archive by the National Emergency Library? 16:26:42

11 A. By the National Emergency Library? Yes. Just
12 yes.

13 Q. Okay. And you -- so I just want to close the
14 loop on this library scanning and loaning issue.

15 So you mentioned anecdotal evidence, and we 16:27:02
16 talked a little bit about chatter. Anything else?

17 A. No.

18 MS. STEINMAN: Objection.

19 Q. BY MS. LANIER: Was your answer "no"? Forgive
20 me. 16:27:14

21 A. It was no.

22 Q. Okay. Is Wiley aware of any studies or analysis
23 concerning the effect that library lending has on
24 revenues from books in a retail setting?

25 A. Yes, on a couple of levels. So, you know, we've 16:27:35

1 talked about piracy. It's -- we consider it piracy. We
2 don't even separate Controlled Digital Lending -- I'm
3 using air quotes because it's not a thing that we
4 recognize. It's stealing. Illegally duplicating digital
5 works that have no right to be duplicated.

16:27:54

6 So we do lump it in to estimating the impact of
7 stealing. And those \$300 million estimates that the
8 industry has come up with, you know, within the last
9 several years are probably reasonable assumptions of the
10 very significant impact. We call it 5 percent of the
11 industry in most respects.

16:28:16

12 So if those were done in 2018, five years ago,
13 this was probably hurting us by 15 million. It's
14 probably 20, 25 million in damages now. You know, we're
15 just taking our approximate share of the industry and
16 assuming that we're, you know, the same amount of piracy.

16:28:32

17 You know, every one of these units that you've
18 stolen would have been paid for. So those are all units
19 that, you know, would have been, you know, properly
20 crediting authors and publishers and distributors and
21 aggregators with, you know, if they had gone through the
22 proper legal commercial channels.

16:28:51

23 So every unit there is -- you know, we have the
24 price-per-unit data here and the list price data. We can
25 apply that to say that, you know, each one of those is

16:29:07

1 damaging the author, is damaging the publisher, is
2 damaging the aggregators who are trying to do this the
3 right way. And so we would add those forms.

4 And, you know, as we were saying, you know,
5 every unit of something stolen is something that, you 16:29:23
6 know, the functioning market could have properly
7 monetized in a way that the law, sort of, affords them
8 the opportunity to do.

9 So stealing is one way of estimating it. We
10 know that a stolen thing is, you know, a sale foregone 16:29:39
11 and that \$300 million worth of estimated stolen things
12 is, you know, a reasonable estimation of the industry's
13 impact.

14 Q. So my question was about libraries, not your
15 characterization of what the Internet Archive does. 16:29:56

16 A. Okay.

17 Q. So has Wiley reviewed any studies or analysis
18 that look into the effect between library lending and
19 revenues from eBooks in a retail setting?

20 A. Legal library lending? Or at least what I would 16:30:13
21 call legal library lending? You're saying --

22 Q. Let's start -- I will say public libraries,
23 academic libraries, K through 12 libraries, as we've been
24 discussing them earlier today.

25 A. But those are the entities, not the actions. 16:30:27

1 STATE OF CALIFORNIA) ss:

2 COUNTY OF MARIN)
3

4 I, LESLIE ROCKWOOD ROSAS, RPR, CSR NO. 3462, do
5 hereby certify:

6 That the foregoing deposition testimony was
7 taken before me at the time and place therein set forth
8 and at which time the witness was administered the oath;

9 That testimony of the witness and all objections
10 made by counsel at the time of the examination were
11 recorded stenographically by me, and were thereafter
12 transcribed under my direction and supervision, and that
13 the foregoing pages contain a full, true and accurate
14 record of all proceedings and testimony to the best of my
15 skill and ability.

16 I further certify that I am neither counsel for
17 any party to said action, nor am I related to any party
18 to said action, nor am I in any way interested in the
19 outcome thereof.

20 IN WITNESS WHEREOF, I have subscribed my name
21 this 13th day of December, 2021.
22

23
24 

25 LESLIE ROCKWOOD ROSAS, RPR, CSR NO. 3462